STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of SAMUEL MCCLERKIN, Deceased.

ERIN SINGLETARY,

Petitioner,

and

FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioner-Appellee,

v

IVAN MCCLERKIN, Personal Representative of the Estate of SAMUEL MCCLERKIN,

Respondent-Appellant.

UNPUBLISHED
November 21, 2006

No. 270100
Wayne Probate Court
LC No. 94-539380-DA

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

In this action for surcharge and return of assets, respondent Ivan McClerkin appeals as of right the probate court's order denying his motion for summary disposition and granting summary disposition in favor of petitioner First American Title Insurance Company (First American). We affirm.

This case arises from respondent's failure, as personal representative of the estate of his deceased father, to discharge a mortgage against property held by the estate before distributing the proceeds of the sale to several estate beneficiaries, including himself. Asserting that respondent was fraudulently and unjustly enriched by this alleged breach of his fiduciary duty to the estate and a warranty against encumbrances contained in the deed granted by respondent in connection with the sale, First American petitioned the probate court for surcharge and return of the proceeds distributed to respondent. In response to the petition respondent asserted, among other things, that he was unaware of the mortgage at the time of the sale and thus could not be held responsible for ensuring its discharge.

In deciding the parties' cross-motions for summary disposition pursuant to MCR 2.116(C)(10), the probate court, citing the estate's prior challenge of the validity of the mortgage and the breadth and cost of litigation surrounding that issue, found respondent's claim that he was unaware of the mortgage at the time of the sale to be so incredible as to defy "logic" and "common sense," and thus insufficient to create a genuine issue of material fact regarding respondent's knowledge of the mortgage at the time of the sale. The court further found that regardless whether respondent possessed actual knowledge of the mortgage at the time of the sale, such knowledge was (1) irrelevant to First American's claim for breach of warranty and, (2) could, in any event, be imputed to respondent through the estate's attorney, Robert Essick, who it was not disputed had participated in the litigation by filing the petition to set aside the mortgage and negotiating settlement of the petition on behalf of the estate. Thus, the court granted summary disposition in favor of First American.

"This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

With the exception of First American's claim for breach of warranty, respondent does not challenge the several legal bases on which the probate court relied in concluding that respondent was liable for return of the proceeds distributed to him following sale of the property. Rather, respondent argues only that the court erred in determining that there was no genuine issue of material fact concerning his knowledge of the mortgage at the time of the sale. Specifically, respondent asserts that the question whether he in fact possessed such knowledge was a matter of credibility not properly resolved on summary disposition, and that there remained a genuine issue of material fact regarding whether Essick's knowledge of the mortgage could be imputed to him. On review de novo, we disagree that summary disposition was precluded on these grounds.

Although respondent is correct that summary disposition is generally not appropriate in cases involving credibility, intent, or state of mind, see *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988), this Court has held that summary disposition in such cases may properly be granted where reasonable minds could not differ in finding the requisite state of mind from the record, *Handelsman*, *supra* at 438-439. Here, the record indicates that although limited by respondent's assertion of the attorney-client privilege, Essick testified at deposition that he would not, as a general matter, file a petition on behalf of a client without first consulting the client and that, in doing so, he would likely discuss with the client the reasons why that particular course of action was necessary. Essick further testified that copies of all significant pleadings and correspondence drafted by him on behalf of a

client are generally provided by him to his clients, and that he had no reason to believe that he had not followed this general course of practice in representing the estate of respondent's father. Essick's testimony in this regard is supported by correspondence between himself and various other individuals wherein Essick discussed the mortgage litigation and which, although not addressed to respondent, indicate that respondent was provided copies of the communications. After acknowledging having signed an order settling that litigation "upon consent of the parties," Essick further testified that he generally would not settle litigation of that "significance" without the approval of his client. Although not dispositive of the issue, we find such testimony to be strong evidence that respondent was apprised of the mortgage litigation and settlement before having sold the property at issue.

That respondent was aware of the pendency of the mortgage at the time he sold the property is also supported by the record. At his deposition, respondent acknowledged that only a few weeks before sale of the property a copy of the petition to set aside the mortgage was sent by facsimile from the office of his business to the real estate broker handling the sale on behalf of the estate. Although respondent challenged the relevance of that facsimile, which failed to itself indicate who sent the document, a cover letter representing that the document was sent by respondent was later produced during discovery and was presented by First American in support of its motion for summary disposition. In addition to this evidence, First American also presented copies of several billing statements indicating that the estate had been charged thousands of dollars for work performed by Essick in litigating the validity of the mortgage, which it is not disputed that respondent, as personal representative of the estate, paid over the two years that the matter was pending in the probate court.

Given this evidence, against which respondent presented only his general denial of any recollection or knowledge of the mortgage litigation and resulting order, we do not conclude that the probate court erred in determining that no reasonable juror could believe that respondent was without knowledge of the mortgage at the time he sold the property and distributed the proceeds of that sale to himself and other beneficiaries of the estate.[1] *Id*.; see also *West*, *supra*. Consequently, we find no merit to respondent's claim that the probate court erred in denying respondent's motion for summary disposition and granting summary disposition in favor of First American. Indeed, as found by the probate court, respondent's "universal denial of any recollection of anything associated with . . . litigation that went on for two years [and] that [respondent] paid for defies any sense of logic or reason or common sense and [is] simply so unbelievable that the denial of recollection does not create a genuine issue of material fact."

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

[1] Because respondent does not challenge his liability in the face of such knowledge, we need not address his assertion that petitioner was without standing to assert a claim for breach of warranty or that the probate court erred in imputing Essick's knowledge of the mortgage to respondent.